

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ALFRED VICARIO,

Petitioner,

vs.

UNKNOWN,

Respondent.

Civil No. 10cv1752-JLS (JMA)

ORDER:

- (1) DENYING MOTION FOR APPOINTMENT OF COUNSEL; AND**
(2) DISMISSING CASE WITHOUT PREJUDICE

Petitioner, a state prisoner proceeding pro se, has submitted a document titled "Motion for Appointment of Counsel for State Habeas Proceedings," which has been docketed as a Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254.

Petitioner has not filed a Petition for a writ of habeas corpus in this action. Therefore, unless Petitioner is a capital prisoner, he has not initiated habeas proceedings in this Court. Calderon (Nicolaus) v. United States District Court, 98 F.3d 1102, 1107 n. 3 (9th Cir. 1996) ("Unlike non-capital prisoner who initiate habeas proceedings by filing a petition for a writ of habeas corpus, capital prisoners commence federal habeas proceedings by filing a request for appointment of counsel."); McFarland v. Scott, 512 U.S. 849 (1994).

Petitioner does not contend that he is a capital prisoner, that is, a prisoner under sentence of death, and there is nothing in the documents he has submitted which indicates that he is a

1 capital prisoner. If Petitioner wishes to proceed with a habeas action in this Court he must (as
2 is the case with all non-capital prisoners) file a petition for a writ of habeas corpus, which will
3 be given a separate civil case number. However, if Petitioner is in fact a capital prisoner, he may
4 request the Court to re-open this action in order to permit him to file a Petition under the civil
5 case number assigned to this action.

6 Petitioner's Motion for Appointment of Counsel is **DENIED** without prejudice to
7 Petitioner to renew his motion if he initiates habeas proceedings in this Court.

8 **CONCLUSION AND ORDER**

9 This action is **DISMISSED** without prejudice because Petitioner has not filed a Petition
10 and has therefore failed to initiate federal habeas proceedings in this action. The Motion for
11 Appointment of Counsel is **DENIED** without prejudice. If Petitioner is a capital prisoner he
12 may request to have this case reopened. The Clerk of Court shall send Petitioner a blank
13 Southern District of California habeas petition form along with a copy of this Order.

14 **IT IS SO ORDERED.**

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16 **DATED: August 26, 2010**

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18 **IRMA E. GONZALEZ, Chief Judge**
United States District Court

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